

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANTHONY RAY HAMMER,

Defendant.

NO: 1:14-CR-2007-TOR

ORDER DENYING DEFENDANT'S
MOTION TO WITHDRAW GUILTY
PLEA

BEFORE THE COURT is Defendant's Motion to Withdraw Guilty Plea (ECF No. 87). Defendant is represented by Lee Edmond. Assistant United States Attorney Alvin L. Guzman represents the United States. The Court has reviewed the record and files herein, the completed briefing, and is fully informed. For the reasons discussed below, the Court **DENIES** Defendant's motion.

BACKGROUND

On June 7, 2013, Defendant Anthony Ray Hammer was arrested in Selah, Washington following a report that he discharged a firearm at another person. The Selah Police Department, in its search incident to Defendant's arrest, found a

1 Beretta 92 FS 9 mm semi-automatic pistol in Defendant's waistband, which
2 contained 12 rounds of ammunition. At the time of the incident, Defendant had
3 four prior felony convictions, all under Wash. Rev. Code § 46.61.024.¹

4 In January 2014, the United States filed a Complaint, and shortly thereafter
5 an Indictment, with this Court, charging Defendant with Felon in Possession of
6 Firearm, 18 U.S.C. § 922(g)(1). On February 11, 2014, a Grand Jury returned a
7 Superseding Indictment against Defendant, charging him with Possession of a
8 Firearm and Ammunition by a Prohibited Person in violation of 18 U.S.C.
9 §§ 922(g)(1) and 924(e).

10 Defendant entered into a written plea agreement and pled guilty to this
11 charge on March 12, 2014, pursuant to Fed. R. Crim. P. 11(c)(1)(C). ECF No. 32.
12 In his plea agreement, Defendant acknowledged that he had been previously
13 convicted of four felony offenses in Washington and was subject to the statutory
14 penalties under the Armed Career Criminal Act ("ACCA"). The statutory
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17 ¹ Attempt to Elude, Yakima County Superior Court, No. 97-1-01891-4; Attempt to
18 Elude, Yakima County Superior Court, No. 00-1-01751-6; Attempt to Elude,
19 Yakima County Superior Court, No. 03-1-00834-1; Attempt to Elude, Yakima
20 County Superior Court, No. 08-1-02440-2.

1 penalties under the ACCA included a term of imprisonment of not less than fifteen
2 years and a maximum of life.² Defendant's Plea Agreement specifically provided:

3 The Defendant understands that this is a Plea Agreement pursuant to
4 Fed. R. Crim. P. 11(c)(1)(C) and that the United States may withdraw
5 from this Plea Agreement if the Court imposes a lesser sentence than
6 agreed upon. The Defendant further understands that the Defendant
will have the option to withdraw from this Plea Agreement if the
Court imposes a sentence harsher than agreed upon.

7 ECF No. 32 at 3. This Court sentenced Defendant on June 24, 2014. ECF No. 41.

8 The Court imposed a 180-month term of imprisonment, 3 years of supervised
9 release, a \$1,000 fine, and a \$100 special assessment, which was consistent with

10 the parties' Rule 11(c)(1)(C) agreement. *Id.* By accepting the plea agreement,

11 Defendant waived all rights to appeal, including his right to file any post-

12 conviction motion attacking his conviction and sentence. ECF No. 32 at 11.

13 Specifically, Defendant waived the right to bring motions pursuant to 28 U.S.C.

14 § 2255, "except one based upon ineffective assistance of counsel based on

15 information not then known by Defendant and which, in the exercise of due

17 ² The presentence investigation report, which also documented Defendant's prior
18 felony convictions, calculated a guideline sentencing range of 168 to 210 months,
19 subject to a statutory mandatory minimum of 180 months of imprisonment. ECF
20 No. 37.

1 diligence, could not be known by Defendant by the time the Court imposes the
2 sentence.” *Id.*

3 Defendant later moved to vacate, set aside, or correct his sentence based on a
4 claim of ineffective assistance of counsel. ECF No. 43. The Court denied
5 Defendant’s motion based on Defendant’s waiver of his right to file such a motion
6 and that under then existing law, Defendant’s prior convictions warranted the
7 sentence imposed. ECF No. 47.

8 Defendant appealed to the Ninth Circuit. While Defendant’s appeal was
9 pending, the Supreme Court decided *Johnson v. United States*, 135 S.Ct. 2551
10 (2015), which struck down the ACCA’s crime of violence residual clause
11 definition. The Supreme Court then decided *Welch v. United States*, ___ U.S. ___
12 136 S.Ct. 1257 (2016), which determined that *Johnson’s* holding applies
13 retroactively to cases on collateral review.

14 The Defendant sought summary remand from the Ninth Circuit, but the
15 Circuit denied remand without prejudice to filing a renewed motion accompanied
16 by an indication that this Court was willing to entertain a motion to reconsider or
17 otherwise reopen proceedings. ECF No. 56.

18 The Defendant filed a motion for an indicative ruling from this Court. ECF
19 No. 57. The Government responded and affirmatively conceded that *Johnson* is a
20 substantive, constitutional holding that is fully retroactive to ACCA cases and the

1 United States had no objection to Defendant's motion. ECF No. 61. Having
2 waived Defendant's habeas waiver, the Court issued an indicative ruling that it
3 would entertain a motion to reconsider its denial of Defendant's motion to vacate,
4 set aside, or correct Defendant's sentence. ECF No. 65. On May 9, 2016, the
5 Ninth Circuit issued a limited remand to this Court to reconsider its denial of
6 Defendant's motion to vacate, set aside, or correct his sentence. ECF No. 66.

7 Defendant then moved the Court to reconsider its denial of his Motion to
8 Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 (ECF No. 43),
9 pursuant to the recent Supreme Court rulings in *Johnson v. United States* and
10 *Welch v. United States* and the government's concession that Defendant was
11 eligible for resentencing. On May 18, 2016, this Court granted Defendant's
12 motion to reconsider the denial of Defendant's § 2255 motion and set this matter
13 for resentencing. ECF No. 69.

14 After a couple of continuances, this matter was finally set for resentencing
15 on September 13, 2016. At the hearing, Defendant contended the Government
16 breached the plea agreement by asking for an upward departure (84 months) from
17 the amended guideline range calculated by the Probation officer (30-37 months).
18 Defendant requested a high end of the guideline sentence and expressed that if the
19 Court intended to impose a sentence above the guideline range, he should be
20 allowed to withdraw from the Rule 11(c)(1)(C) plea in this case.

1 The Court once again continued the sentencing hearing and ordered the
2 parties to brief the options available to the Court and whether Defendant
3 maintained any right to withdraw from his guilty plea and demand a trial. The
4 Defendant filed the instant motion to withdraw his plea, the Government opposes
5 Defendant's motion.

6 DISCUSSION

7 First, it must be recognized by which vehicle Defendant's case comes back
8 before this Court. This is not an original sentencing, nor a remand from a direct
9 appeal.³ Defendant filed a collateral attack of his sentence through a 28 U.S.C.
10 § 2255 petition. ECF No. 43. Specifically, Defendant contended that his sentence
11 was illegal and that he should be resentenced. ECF Nos. 43 at 13; 43-1 at 6.
12 Indeed, 28 U.S.C. § 2255(a) provides:

13 A prisoner in custody under sentence of a court established by Act of
14 Congress claiming the right to be released upon the ground that the
15 sentence was imposed in violation of the Constitution or laws of the
16 United States, or that the court was without jurisdiction to impose
17 such sentence, or that the sentence was in excess of the maximum
authorized by law, or is otherwise subject to collateral attack, may
move the court which imposed the sentence to vacate, set aside or
correct the sentence.

18 While § 2255(b) provides other remedies, those remedies are applied as
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20 ³ The Court rejects all the direct review cases cited by the parties as inapposite.

1 appropriate to those certain constitutional rights that have been denied or infringed.
2 Defendant's § 2255 petition never claimed his plea was involuntary or that he was
3 entitled to a trial, he only claimed his sentence was illegally excessive.

4 Defendant claims that without knowing the Supreme Court would declare
5 the residual clause of the Armed Career Criminal Act unconstitutional, thereby
6 reducing the statutory sentencing range from 15 years to life, to no more than 10
7 years, his plea was neither knowingly nor intelligently made. ECF No. 87 at 4-8.
8 The Supreme Court, long ago, set forth the test to be applied in this regard.

9 A defendant is not entitled to withdraw his plea merely because he
10 discovers long after the plea has been accepted that his calculus
11 misapprehended the quality of the State's case or the likely penalties
12 attached to alternative courses of action. More particularly, absent
13 misrepresentation or other impermissible conduct by state agents, a
voluntary plea of guilty intelligently made in the light of the then
applicable law does not become vulnerable because later judicial
decisions indicate that the plea rested on a faulty premise.

14 *Brady v. United States*, 397 U.S. 742, 757 (1970) (internal citation omitted). "We
15 find no requirement in the Constitution that a defendant must be permitted to disown
16 his solemn admissions in open court that he committed the act with which he is
17 charged simply because it later develops that the State would have had a weaker
18 case than the defendant had thought or that the maximum penalty then assumed
19 applicable has been held inapplicable in subsequent judicial decisions." *Id.*

1 Here, Defendant proffers precisely what the Supreme Court condemns as a
2 reason to withdraw a guilty plea. Defendant claims there was a “mutual mistake as
3 to an essential term, rendering the plea agreement null and void and mandating that
4 Mr. Hammer be allowed to withdraw his plea of guilty.” ECF No. 87 at 10. This
5 Court administered the plea colloquy and is convinced Defendant’s plea was
6 knowingly, voluntarily and intelligently made with no reason to doubt Defendant’s
7 solemn admission of guilt was truthful. *See Brady*, 397 U.S. at 758 (“convinced
8 that his plea was voluntarily and intelligently made and we have no reason to doubt
9 that his solemn admission of guilt was truthful”)

10 Defendant also claims that performance of the plea agreement is impossible,
11 that the conditional nature of the Rule 11(c)(1)(C) plea allows him to withdraw,
12 and that he has expressed a fair and just reason to withdraw. But none of those
13 reasons are properly before the Court in this collateral proceeding, nor validly
14 plead in this § 2255 action, nor remedies for which the holdings in *Johnson* and
15 *Welch* endorse.

16 The Supreme Court’s most recent pronouncement, in an analogous situation,
17 is instructive as to the remedy available to the Court to correct the illegal sentence
18 in this case. In *Freeman v. United States*, 564 U.S. 522 (2011), the Supreme Court
19 considered whether a defendant sentenced under a Rule 11(c)(1)(C) agreement
20 may be eligible for a sentence reduction under § 3582(c)(2). In ruling on that

1 issue, the four-justice plurality made several observations that apply equally to the
2 issue before this Court.⁴ Rule 11(c)(1)(C) permits the defendant and the
3 prosecutor to agree that a specific sentence is appropriate, but that agreement does
4 not discharge the district court's independent obligation to exercise its discretion.
5 *Freeman*, 564 U.S. at 529. Any bargain between the parties is contingent until the
6 court accepts the agreement. *Id.* at 529-30. In rejecting the Government's
7 argument that a statutory sentencing reduction would upset the bargain struck
8 between the prosecutor and the defendant, the Court observed that its concern was
9 overstated, reductions are infrequent, and the district court's authority is subject to
10 significant constraints, including appellate review. *See id.* at 531. The *Freeman*
11 plurality authorized resentencing, despite the Rule 11(c)(1)(C) binding plea
12 agreement to the contrary, reasoning that:

13 District judges have a continuing professional commitment, based on
14 scholarship and accumulated experience, to a consistent sentencing
15 policy. They can rely on the frameworks they have devised to
16 determine whether and to what extent a sentence reduction is
17 warranted in any particular case. They may, when considering a
18 § 3582(c)(2) motion, take into account a defendant's decision to enter
19 into an 11(c)(1)(C) agreement. If the district court, based on its
20 experience and informed judgment, concludes the agreement led to a
more lenient sentence than would otherwise have been imposed, it can
deny the motion, for the statute permits but does not require the court

⁴ *See United States v. Davis*, 825 F.3d 1014 (9th Cir. 2016) (*en banc*), for a full
discussion of the holding in this fractured Supreme Court decision.

1 to reduce a sentence. This discretion ensures that § 3582(c)(2) does
2 not produce a windfall.

3 *Id.* at 532. The plurality opinion reasoned that were sentencing reductions
4 prohibited for these Rule 11(c)(1)(C) cases, it would create the very disparities the
5 Sentencing Reform Act seeks to eliminate. *See id.* at 533. The Act aims to create a
6 comprehensive sentencing scheme in which those who commit crimes of similar
7 severity under similar conditions receive similar sentences. *Id.* (citing 18 U.S.C.
8 § 3553(a)(6)).

9 Defendant is mistaken that he retains a right to withdraw from his plea
10 agreement if the Court does not follow the binding recommendation of the parties.
11 Defendant only retained the right to withdraw if the Court “imposes a sentence
12 harsher than agreed upon.” ECF No. 32 at 3. Defendant has no right to complain
13 because his sentence will be 10-years or less, not the 15 years for which he
14 previously bargained. Moreover, the Court reiterates that the prior 15-year
15 sentence is illegal, not the voluntariness of Defendant’s plea. The Court is
16 constrained to provide a remedy no greater than necessary to alleviate the
17 constitutional violation. *See* 28 U.S.C. § 2255(b) (the court shall implement
18 remedies “as may appear appropriate”). This is especially true here, where years
19 have passed since the original crime, memories have faded, and evidence may no
20 longer be available.

1 The Court distinguishes those few federal cases allowing the Government to
2 re-institute dismissed charges in order to effectuate the rejected plea bargain. *See,*
3 *e.g., United States v. Gibson*, 356 F.3d 761 (7th Cir. 2004) (direct appeal); *United*
4 *States v. Greatwalker*, 285 F.3d 727 (8th Cir. 2002) (direct appeal); *United States*
5 *v. Moulder*, 141 F.3d 568 (5th Cir. 1998) (§ 2255 proceeding); and *see* Annotation,
6 *Plea Bargain-Illegal Sentence*, 87 A.L.R.4th 384 (1991 & Supp. 2001) (collecting
7 mostly state cases). The Eighth Circuit in *Greatwalker* recognized that
8 “[w]ithdrawal of the plea may be unnecessary when the agreed-on sentence
9 exceeds the sentence authorized by law and the government accepts a sentence
10 reduced to the legal term.” *Id.* at 730 (*citing* 87 A.L.R.4th 384). That is precisely
11 the case here.


12 **ACCORDINGLY, IT IS HEREBY ORDERED:**

- 13 1. Defendant’s Motion to Withdraw Guilty Plea (ECF No. 87) is **DENIED**.
- 14 2. The re-sentencing hearing scheduled for **October 11, 2016 at 1:00 p.m.** in
15 Yakima, Washington, remains set.

16 The District Court Executive is hereby directed to enter this Order and
17 furnish copies to the parties.

18 **DATED** October 7, 2016.




THOMAS O. RICE
Chief United States District Judge